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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CENTRAL OF GEORGIA RAILROAD COMPANY,
Petitioner,

v.

JAMES E. HENDLEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES A. HORSKY
DONNA L. KOHANSKY
888 - 16th Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner

WILLIAM P. STALLSMITH, JR.
JOHN B. MILLER
EDGAR A. NEELY, JR.
ELLSWORTH HALL, JR.
P.O. Box 1808
Washington, D.C. 20013
Of Counsel

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Central of Georgia Railroad Company, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Georgia is reported at 442 F. Supp. 482, and is reproduced in Appendix D at pages 18a-25a. The opinion of the Court of Appeals is reported at 609 F.2d 1146, and is reprinted in Appendix B at pages 4a-16a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1980 (App. C, p. 17a). The time to file an application for rehearing was extended, and a timely petition for rehearing *en banc* was denied on March 12, 1980 (App. G, p. 32a). Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

May an employee avoid mandatory arbitration under the Railway Labor Act, 45 U.S.C. § 153, of his wrongful discharge grievance by filing a suit to enjoin the railroad's disciplinary investigation that resulted in his discharge, alleging violation of 45 U.S.C. § 60, a criminal statute adjunct to the Federal Employers' Liability Act?

STATUTES INVOLVED

The Railway Labor Act, 45 U.S.C. § 153 First (i), (m) and (q), and Section 153 Second; and the Federal Employers' Liability Act, 45 U.S.C. § 60. Their pertinent text is set forth in Appendix A at pages 1a-3a.

STATEMENT

This action began as an effort by respondent Hendley to enjoin petitioner Central of Georgia Railroad Company from conducting a disciplinary investigation pursuant to the applicable collective bargaining agreement as to whether Hendley, one of Central's employees, had been guilty of disloyalty. Under investigation was Hendley's accompanying and assisting an attorney for the plaintiff in an unrelated and terminated

FELA action in surreptitiously entering private property without authorization to photograph the scene of the accident involved in the FELA case. The injunction was sought on the ground that the investigation would violate 45 U.S.C. § 60, a criminal statute forbidding any action which would prevent any person from voluntarily providing information as to the facts incident to any injury of an employee.[1] Hendley also alleged that the investigation would violate Georgia Code § 79-205, which, *inter alia,* guarantees due process, but he did not pursue this ground. Hendley asserted 28 U.S.C. § 1331, 45 U.S.C. § 60, and 45 U.S.C. § 56 as bases of jurisdiction. The District Court denied relief. (App. D, pp. 18a-25a.) Noting the applicability of the grievance machinery of the collective agreement and the Railway Labor Act to this dispute (*ibid.,* pp. 20a-21a), the District Court observed that Hendley's purpose in seeking an injunction was "not to obtain relief under 45 U.S.C. § 60," but rather "to by-pass the mandatory remedies prescribed by Congress" (*ibid.*, p. 23a). The District Court accordingly held that Hendley's grievance against Central was a "minor dispute" subject to the exclusive jurisdiction of the National Railroad Adjustment Board under the Railway Labor Act, 45 U.S.C. § 153. (*Ibid.,* pp. 24a-25a.) The District Court further held that Hendley "[c]learly . . . has an adequate administrative remedy under the law" because "[t]he dispute involved in this case is part of the ordinary, diurnal grist of employee-employer relations;" "[t]he questions involved in the disciplinary investigation include whether or not the conduct complained of constituted disloyalty;" and "[s]uch questions of fact (or law)

[1] The full text of Section 60 is set out in Appendix A at page 3a.

are determinable under established grievance and arbitral procedures, contractual and statutory." (*Ibid.*, pp. 23a-24a.)

Following the District Court's decision and subsequent denials of Hendley's requests for an injunction pending appeal, Central's internal investigation proceeded. Central's charge was based on descriptions of Hendley's conduct made during his deposition in the discontinued FELA proceeding.[2] At the investigation hearing some conflicting testimony was presented. On the whole record, Central concluded that the weight of the evidence showed that Hendley had been disloyal, and that dismissal was the appropriate sanction.

Hendley obtained review of the railroad's decision by a Public Law Board as provided by the Railway Labor Act, 45 U.S.C. § 153 Second.[3] That Board up-

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[2] Hendley was not called as a witness in the FELA case, but the photographs that he helped to procure were admitted in evidence in that case. (App. D, p. 18a, n.1.)

[3] The pertinent text of 45 U.S.C. § 153 Second is reproduced in Appendix A, at pages 2a-3a. Public Law Boards were created in a 1966 amendment to the Railway Labor Act, Pub. L. No. 89-456, 80 Stat. 208, to relieve the congestion in the docket of the National Railroad Adjustment Board. The two boards are identical in jurisdiction, since Public Law Boards are empowered "to resolve disputes otherwise referable to the Adjustment Board." 45 U.S.C. § 153 Second. And the scope of judicial review of Public Law Board decisions is the same as the scope of review of the decisions of the National Railroad Adjustment Board. 45 U.S.C. § 153 Second; *see* DiBlasi v. Baker, 404 F. Supp. 654, 655 (D. Mass. 1975), *aff'd mem.*, 539 F.2d 702 (1st Cir. 1976). The Public Law Board that handled Hendley's grievance (Public Law Board No. 2086) was properly established pursuant to 45 U.S.C. § 153 Second by agreement between United Transportation Union and Central of Georgia Railroad Company. All references herein to the powers and attributes of Adjustment Boards therefore apply equally to the Public Law Board whose decision is involved in this case.

held Central's determination that Hendley had been disloyal. (App. F, pp. 29a-30a.) It disagreed with Central, however, on the appropriate sanction. While agreeing that Hendley's offense warranted disciplinary action, it found dismissal too harsh a penalty, and ordered Hendley reinstated but without back pay. (*Ibid.*, p. 30a.) Neither Hendley nor Central petitioned for judicial review of the Board's action as provided by the Act, 45 U.S.C. § 153 First (q). Hendley was promptly reinstated and has continued to be an employee of Central.

Meanwhile, Hendley had appealed from the District Court's denial of injunctive relief. While the case was pending in the Court of Appeals, Hendley, over Central's objections, lodged with that court a transcript of Central's internal investigation. When the Public Law Board's decision was made, Central lodged a copy of that with the court below.

On that record, and not, it should be emphasized, in a proceeding to review the decision of the Public Law Board as provided in 45 U.S.C. § 153 First (q), the court below declared the award of the Board "null and void." (App. B, p. 16a.) The court found "coercive" the fact that the Railway Labor Act requires an employee "to submit to the hearing and to process his claim through arbitration before finally reaching the federal courts" (*ibid.*, p. 14a), and held that Hendley's claim that the contractually and statutorily prescribed investigation and arbitration procedures were instituted for retaliatory purposes in violation of Section 60 may be determined by the federal courts outside the procedures of the Railway Labor Act (*ibid.*, pp. 15a-16a). It then made its own evaluation of the conflicting evidence contained in the investigation

transcript which had been before the Public Law Board, disagreed with the Board's finding that Hendley's conduct had constituted disloyalty, and ordered that Hendley receive full back pay. (*Id.*)

A timely petition for rehearing *en banc* was denied. (App. G, p. 32a.)

REASONS FOR GRANTING THE WRIT

I.

The decision below conflicts with the principles established by this Court in *Andrews* v. *Louisville & Nashville Railroad,* 406 U.S. 320, and *Farmer* v. *United Brotherhood of Carpenters & Joiners,* 430 U.S. 290. In *Andrews,* the Court made clear that the National Railroad Adjustment Board's jurisdiction over wrongful discharge disputes may not be circumvented through a court action brought by an employee claiming to assert no rights under the collective bargaining agreement but, rather, under the general law of contracts. The Court expressly rejected the notion that the employee's characterization of the nature of his complaint could operate to avoid jurisdiction under the Railway Labor Act. 406 U.S. at 323-24. Subsequently, in *Farmer,* the Court stressed that a suit under state law for intentional infliction of emotional distress, based on a series of incidents that could form the basis of an unfair labor charge before the National Labor Relations Board, may be maintained only if and to the extent that there is no realistic threat of interference with the federal regulatory scheme, that is, only if there is no overlap in enforcement of two discrete areas of government concern. 430 U.S. at 304-307. The lesson of *Andrews* and *Farmer* is that a court

must look beyond the form of an action to the substance of the claim in order to ensure that providing a judicial forum for resolution does not interfere with the remedies provided by the federal regulatory scheme.[4]

This is precisely what was done by the District Court in the present case. (App. D, p. 23a.) It is also precisely what was ignored by the court below. Notwithstanding the language of Hendley's complaint, his grievance, as the District Court recognized, was in substance that he would be wrongfully discharged unless the railroad was enjoined.[5] Ignoring the holding of *Andrews* that a wrongful discharge claim is within the exclusive province of the Board, the court below accepted Hendley's characterization of his claim. It then adopted the simple expedient of stating that since resolution of Hendley's claim involves interpre-

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[4] Substance over form has long been the rule in cases dealing with the "major"-versus-"minor" dispute dichotomy under the Railway Labor Act. Switchmen's Union of North America v. Southern Pacific Co., 398 F.2d 443, 447 (9th Cir. 1968). Thus, regardless of how parties characterize their dispute, it will be held to be a "minor dispute" within the exclusive province of the Adjustment Board if the disputed action by one of the parties can "arguably" be justified in the agreement or if the contention that the contract sanctions the disputed action is not "obviously insubstantial." *E.g.*, United Transportation Union v. Baker, 482 F.2d 228 (6th Cir. 1973).

Like *Andrews*, 406 U.S. at 323, these decisions reflect the preference for arbitration which is embodied in our federal labor-management relations laws and which requires courts to resolve doubts in favor of arbitration, *see* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578, 582-83—a prudent policy to which the decision below fails to adhere.

[5] This plainly appears from the face of Hendley's complaint itself, in which he requests relief from petitioner's "interfering with Plaintiff's employment." (Complaint, ¶ 9.)

tation of a federal statute, Section 60, it "is therefore a matter of federal jurisdiction" and the disputes resolution system of the Railway Labor Act may be ignored. (App. B, p. 11a.)[6] However, as *Andrews* and *Farmer* make clear, remaining faithful to the Congressional purposes in establishing the compulsory arbitration procedures of the Railway Labor Act requires a more searching scrutiny. Article 21 of the applicable collective bargaining agreement[7] confers on Hendley the right not to be disciplined unjustly or "without just cause." If Hendley's investigation and discharge by the railroad violate Section 60, they also violate the collective agreement. This is especially true since subsisting laws must enter into and form part of a contract. *Von Hoffman* v. *Quincy*, 71 U.S. (4 Wall.) 535, 550; *e.g.*, *Armour Packing Co.* v. *United States*, 209 U.S. 56, 82 (a federal criminal statute).[8] And contrary to the suggestion of the court below,

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[6] What is involved here is the proper application and interpretation of a labor agreement, 45 U.S.C. § 153 First (i) (App. A, p. 1a), not the validity of a labor agreement, a confusion suggested by the erroneous reliance by the court below (App. B, p. 11a) on decisions in which the validity of agreements was challenged (Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 68; Brotherhood of Railroad Trainmen v. Smith, 251 F.2d 282 (6th Cir. 1958)).

[7] Agreement between Central of Georgia Railroad Company and its Switchmen Represented by United Transportation Union (effective December 1, 1977).

[8] The Adjustment Board is fully empowered to resolve grievances involving terms not expressly included in a collective agreement. Elgin, Joliet & Eastern Railway v. Burley, 325 U.S. 711, 723; Railway Labor Executives Association v. Atchison, Topeka & Santa Fe Railway, 430 F.2d 994, 996 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); Missouri-Kansas-Texas Railroad v. Brotherhood of Railroad Trainmen, 342 F.2d 298, 300 (5th Cir. 1965); Illinois Central Railroad v. Brotherhood of Locomotive Firemen and Enginemen, 332 F.2d 850, 853 (7th Cir.), *cert. denied*, 379 U.S. 932 (1964).

the Board is competent to construe the agreement by interpreting and applying the applicable federal law. *E.g., Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342; *Railway Labor Executives Association* v. *Atchison, Topeka & Santa Fe Railway*, 430 F.2d 994, 997 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971).[9]

Indeed, the opinion of the court below itself belies any attempt to treat Hendley's Section 60 claim as collateral to the Act's grievance machinery. The factual basis of Hendley's Section 60 claim is precisely the same as that of the grievance he processed before the Board. But despite the warnings of this Court in *Farmer*, the court below adjudicated these facts, reaching a conclusion opposite to that reached by the Board. (App. B, pp. 15a-16a; *see also ibid.*, p. 8a, n.3.) Furthermore, the Court of Appeals ordered that Hendley receive back pay for the time he was unemployed until the Board ordered his reinstatement (*id.*), the very relief the Board is empowered to provide and declined to provide in this case.[10]

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[9] Judicial review of the Board's decision is available under 45 U.S.C. § 153 First (p) or (q). *See* Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89, 93 (judicial review of Adjustment Board orders is confined to the three specific grounds stated in the Act); Gunther v. San Diego & Arizona Eastern Railway, 382 U.S. 257, 261 (Board interpretation of contract may be set aside if wholly baseless and completely without reason); Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. at 347 (Board's interpretation may be set aside if not in accordance with the law).

[10] The decision below is particularly egregious. (1) The court ignored the statutory procedure for review of Adjustment Board decisions, 45 U.S.C. § 153 First (p) and (q), even though this procedure is vital to the integrity of the grievance machinery of the Act. Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad, 373 U.S. 33, 38. (2) Although there had been no evidentiary hearing by the trial court, the court below adjudi-

Disregard for the decisions of this Court cannot be justified on the basis of the unsupported and unsupportable conclusion of the court below that Section 60 overrides the statutory arbitration process mandated by the Railway Labor Act. (App. B, p. 9a.)[11] There is no indication whatever either in the terms of Section 60 or in its history that Congress intended to override the single forum requirements of the Railway Labor Act established only five years before and hailed as a great advancement in effective railway labor disputes resolution.[12] Section 60, a criminal statute, does not even expressly authorize a cause of action for its civil enforcement. The conclusion that Congress expected that grievances raising Section 60 claims would be processed by the Adjustment Board is reinforced by the fact that, in enacting Section 60, Congress was aware that the Board routinely handled grievances

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cated the conflicting facts contained in the transcript of the railroad's internal investigation, depriving petitioner of an opportunity to present evidence and to address legal arguments to the court. Singleton v. Wulff, 428 U.S. 106, 120.

[11] The sole reason offered by the court below for its conclusion that Section 60 overrides the Railway Labor Act's mandate of compulsory arbitration was that the Railway Labor Act requires Hendley to submit to the railroad's investigation and to process his claim to the Board before reaching the federal courts. (App. B, p. 10a.) Indeed, the court found this requirement "coercive." (*Ibid.*, p. 14a.) This, of course, flies in the face of both the Act itself and this Court's specific approval of the exhaustion requirement in *Andrews*. 406 U.S. at 325. In any event, "the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage." Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51.

[12] *See generally* Garrison, "The National Railroad Adjustment Board: A Unique Administrative Agency," 46 *Yale L. Rev.* 567 (1937).

brought by employees discharged for giving information in violation of railroad rules such as those prohibited by Section 60 and that the Board had condemned such discharges as wrongful and illegal.[13] Indeed, the extended discussion of the Board's decisions during Senate hearings indicates that they formed the backdrop for the protections embodied in the statute.[14] Had Congress intended that courts assume the Board's function in these disputes, it surely would have made its intention plain.

II.

The decision below also is irreconcilable with two decisions of another Court of Appeals in which, as here, employees sought to avoid Adjustment Board jurisdiction by characterizing the rights they asserted as arising under state or federal law but where, also as here, in substance the rights asserted involved governing provisions of collective bargaining agreements.

In *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978), a railroad employee was discharged following a company investigation of his conduct in connection with a train accident. The employee brought an action in state court, alleging that the railroad had abused the investigatory process. He attempted to justify resort to the state court by variously characterizing his claim as a tort suit for intentional infliction of emotional

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[13] Hearings on S. 1708 Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 1st Sess. 23, 39, 40-41, 42-44, 84 (1939) (statements of T. J. M'Grath, Brotherhood of Railroad Trainmen, and F. M. Rivinus, Norfolk & Western Railroad Co.).

[14] *Id.*

distress, as one for violation of his due process rights, and as an action for fraud. In a well-reasoned opinion discussing *Andrews* and *Farmer,* the Ninth Circuit rejected these characterizations for what they were—an effort to avoid the Railway Labor Act's disputes resolution machinery—and concluded that "[a]rtful pleading cannot conceal the reality that the gravamen of the complaint is wrongful discharge." 576 F.2d at 1369. Since all of the alleged wrongful conduct of which the plaintiff complained was at least arguably governed by the collective agreement, which provided that he could not be disciplined "without proper investigation," there was complete overlap between judicial redress of the rights asserted and the grievance machinery of the Railway Labor Act. *Id.* at 1369-70. Accordingly, the plaintiff's exclusive remedy was under the Act. *Id.*

An earlier case in the same circuit is to the same effect. In *Railway Labor Executives Association* v. *Atchison, Topeka & Santa Fe Railway,* 430 F.2d 994 (9th Cir. 1970), *cert. denied,* 400 U.S. 1021 (1971), railroad employees sought damages for loss of work resulting from train discontinuances by the railroad, which they alleged violated the Interstate Commerce Act, 49 U.S.C. § 13a (1964). The court looked to the substance of the claim and found exclusive jurisdiction in the Board to resolve what was essentially an attempt to assert a right incident to the employment relationship:

> "The employees seek to characterize this action as a 'tort action' for violation of a statutory duty and, therefore, not referrable to the Adjustment Board. But the provisions of the Railway Labor Act relate to matters of substance, not form. [Cita-

> tion omitted.] Where, as here the dispute grows out of the employment relationship and, in the final analysis, involves an attempt to impose a right which is incident to that relationship, the statutory forum is the Adjustment Board, absent a clear expression of legislative policy to the contrary." *Id.* at 997.

The interpretation of Section 13a of the Interstate Commerce Act by the Board was found to be entirely appropriate,[15] especially since the Board's expertise in railroad practices and its duty to consider the effect of its ruling on future bargaining in the industry would be called into play to resolve the disagreement. *Id.*[16]

III.

The integrity of the Railway Labor Act's disputes resolution machinery when challenged by resort to other forums is important to the effective operation of the Act, as this Court has often recognized. *E.g., Brotherhood of Locomotive Engineers* v. *Louisville & Nashville Railroad,* 373 U.S. 33, 38; *Pennsylvania Railroad* v. *Day,* 360 U.S. 548, 552-53; *Slocum* v.

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[15] Although there was no express provision in the collective agreement governing the employees' claim, the court noted that the language of the Interstate Commerce Act could have been incorporated into the agreement or bargained out in negotiation. 430 F.2d at 996.

[16] In a similar case involving an attempt by employees to enforce a railroad's common law duty to furnish a safe work place, a duty which was not expressly included in the applicable collective agreement, the Fifth Circuit itself held that the Railway Labor Act required the Adjustment Board to settle the grievance. Missouri-Kansas-Texas Railroad v. Brotherhood of Railroad Trainmen, 342 F.2d 298, 300 (5th Cir. 1965).

Delaware, Lackawanna & Western Railroad, 339 U.S. 239, 243-44. In the instant case, the dual processing of Hendley's grievance by both the Board and the court below and the clash between the results reached in the two forums are a paradigm of the dangers that this Court has recognized will defeat the central purpose behind the Act's providing for compulsory arbitration in a single forum specially competent in understanding the practices among railroad employees and employers.[17] *Pennsylvania Railroad* v. *Day,* 360 U.S. 548, 552-53. Other dangers, "races of diligence" to the preferred forum and deprivation of the other party's privilege under 45 U.S.C. § 153 First (i) of referring the dispute to the Board, were pointed out by the Court in *Order of Railway Conductors* v. *Southern Railway,* 339 U.S. 255, 256-57, a case in which, as here, a court had proceeded to adjudicate the very same dispute that was before the Adjustment Board.

If allowed to stand, the decision below will be a dangerous precedent under which employees asserting claims incident to the employment relationship may nevertheless bypass the competent jurisdiction of the Board simply by alleging a violation of some right under state or federal law.[18] The only limit on the

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[17] The Board's experience would be of great assistance here in determining, for example, whether in a labor context in which "robust language and clash of strong personalities . . . may be commonplace," Farmer v. United Brotherhood of Carpenters & Joiners, 430 U.S. at 306, a disciplinary investigation has the "intimidating effect" perceived by the court below (App. B, p. 13a).

[18] Even though the court below stated that there are situations in which an employee may be disciplined without violating Section 60, in exercising "jurisdiction to determine whether a disciplinary hearing is brought for purposes violative of § 60" (App. B, p. 15a), a court necessarily must determine the merits of the question whether Section 60 is violated.

variety of ways in which employees may attempt to characterize such claims is their ingenuity. A graphic illustration is the damage action recently instituted by Hendley against petitioner and others in federal district court in Georgia,[19] for, *inter alia,* wrongful deprivation of his employment, mental anguish, deprivation of his rights of free speech and association, defamation, and libel—all of which he claims resulted from the very investigation and discharge at issue in this case.[20]

CONCLUSION

The decision below is incorrect, and dangerously so. As the decisions cited above indicate, there are continuing efforts to evade, by artful pleading in federal and state courts, the comprehensive and compulsory arbitration procedures of the Railway Labor Act. While the results of proceedings under the Act may often prove disappointing to railroads as well as their employees, proper channels of judicial review are

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[19] Hendley v. Southern Railway Company, *et al.*, No. CV 479-351 (S.D. Ga.; complaint filed November 26, 1979). Hendley previously had filed the identical action in state court, but withdrew his complaint after filing the federal lawsuit. Hendley v. Southern Railway Company, *et al.*, No. 15096C (Chatham Co., Georgia, Superior Ct.; complaint filed November 16, 1979).

[20] Another example is Choate v. Louisville & Nashville Railroad, —— F. Supp. ——, No. 79-4206 (S.D. Ill. March 21, 1980), in which an employee sought to bypass the judicial review procedures of the Railway Labor Act, 45 U.S.C. § 153 First (p), by filing a suit for damages for the railroad's alleged refusal to comply with a Public Law Board award, which he claimed caused him substantial emotional distress. Relying on *Andrews* and *Farmer,* the District Court refused to entertain his action, noting that "[i]f this Court allowed every plaintiff who was wrongfully discharged to couch his complaint in such terms, it would clearly be in derogation of the purposes of the R.L.A." *Slip op.* at 3.

available, and the Adjustment Boards have disposed of countless thousands of minor disputes which otherwise would have burdened court dockets and been the potential source of industrial strife. It is of more than ordinary importance that there can be no encouragement to those who would nullify a wise Congressional policy favoring arbitration. Unless reversed, the decision below may have just that effect.

Indeed, because the Court may conclude that the court below committed clear error in injecting itself into a matter which had already been resolved by the Adjustment Board, the appropriate relief may be a summary reversal with instructions to dismiss the complaint. *Cf. Northern Indiana Public Service Commission* v. *Porter County Chapter,* 423 U.S. 12; *Mason* v. *City of Biloxi,* 385 U.S. 370; *Johnson* v. *Virginia,* 373 U.S. 61. Or, the court may conclude that the case should be set for briefs and argument.

Respectfully submitted,

CHARLES A. HORSKY
DONNA L. KOHANSKY
888 - 16th Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner

WILLIAM P. STALLSMITH, JR.
JOHN B. MILLER
EDGAR A. NEELY, JR.
ELLSWORTH HALL, JR.
P.O. Box 1808
Washington, D.C. 20013

Of Counsel

June, 1980

APPENDIX

APPENDIX A

Text of Statutes Involved

The Railroad Labor Act, 45 U.S.C. § 153 First, provides in relevant part:

> (i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.
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> * * *
>
> (m) The awards of the several divisions of the Adjustment Board . . . shall be final and binding upon both parties to the dispute.
>
> * * *
>
> (q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it

based its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28.

The Railway Labor Act, 45 U.S.C. § 153 Second, provides in relevant part:

* * *

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made.

* * *

> . . . awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

The Federal Employers' Liability Act, 45 U.S.C. § 60, provides:

> Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided,* That nothing herein contained shall be constructed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-1058

JAMES E. HENDLEY,
Plaintiff-Appellant,

v.

CENTRAL OF GEORGIA RAILROAD CO.,
Defendant-Appellee.

January 15, 1980

Appeal from the United States District Court for the Southern District of Georgia.

Before TUTTLE, VANCE and KRAVITCH, Circuit Judges.

TUTTLE, Circuit Judge:

The appellant, a railroad employee, was charged with disloyalty to the railroad because of his assistance in a fellow employee's FELA action against the railroad. He filed an action to enjoin the railroad from conducting a disciplinary hearing, and now appeals from the district court's denial of the injunction. We reverse and remand.

James E. Hendley is employed by Central of Georgia Railroad as a switch engine foreman, and serves as local chairman of the United Transportation Union. In 1977, Daniel Razook, also a Central of Georgia employee, filed suit under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, against Central of Georgia and Union Camp Corporation, a customer of the railroad. Razook had been injured while working on a Central of Georgia railroad track which runs through the property of Union Camp Corporation. Although the property on which the tracks are located is owned by Union Camp, Central of Georgia

and the Seaboard Coast Line Railroad have operating rights to the tracks.

Hendley had not been present when Razook was injured; however, he had been employed by the railroad for twenty-five years and was very familiar with the Union Camp yard. Razook, who was confused about the exact physical layout of the tracks, called Hendley at home and asked Hendley to meet him at the Union Camp Company to look at the tracks. Hendley, who was not on duty that day, arrived first, and was met on the property by Razook and Billy Moore, Razook's attorney. Razook had not mentioned to Hendley that he would be accompanied by his attorney. The three men walked through a gate to the area where the tracks were located. While Razook and Hendley were discussing the tracks, Moore took some pictures of the yard. Hendley did not assist Moore in taking the pictures. An engine was stopped in the woodyard, and Hendley and Moore apparently stepped up on it to speak to the railroad workers. None of the parties can recall whether the engine belonged to Seaboard or Central of Georgia.

On November 11, 1977, Hendley was deposed in connection with the Razook case. He answered questions concerning the physical characteristics of the Union Camp yard and discussed his visit to Union Camp to view the tracks with Razook. Certain responses in the deposition indicated that Hendley and Moore had climbed up onto a switch engine.[1]

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[1] The deposition also included the following exchange between John Miller, the attorney for Central of Georgia, and Hendley:

Q. You said you came in on a road there. Did you come into Union Camp's premises on the switch engine, or did you——

A. No. We drove in on the premises.

Q. How did you get through the gate?

A. When you say "premises," I don't know if you mean the yard or the particular track. We drove in off Bay Street

A few days after Hendley's deposition was taken, W. D. Cogdell, Hendley's superintendent, saw the deposition while helping to prepare the defense in Razook's case. After reviewing the deposition, he concluded that Hendley was guilty of disloyalty to the railroad. The trial of Razook's case against the railroad ended on November 30, and on the next day, December 1, Hendley received a letter from Cogdell informing him of a formal investigation to be held on December 2 at 11:00 A.M. The letter charged Hendley with "disloyalty to the Central of Georgia Railroad Company in that you accompanied and assisted Mr. Billy Moore onto the property of the Union Camp Corporation

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to the yard and walked down the yard where there was a switch engine on Track 16.

Q. That's the same way you come in when you go to work out there?

A. Yeah.

Q. Do you have a sticker on your car, with identification?

A. No, sir.

Q. How do you get through the gate?

A. Well, there's no gate actually. When I say "gate," I thought ya'll were referring to the gate that comes into these two particular tracks.

There's two roads that lead—no road for an automobile. It's just a gate for the track.

Q. Well, when you drove the switch engine in there, was that part of the job you were doing, or did you take it in there just to take pictures?

A. No, there was a switch engine, if I'm not mistaken, that was going that way, because I don't know these people, really. I can't really remember.

From reading this language, Hendley's superintendent concluded that Hendley and Moore had stopped an engine and ridden into the yard. At the disciplinary hearing, it developed that they did not actually ride into the woodyard on a locomotive engine. They merely stepped onto an engine briefly to speak to other employees.

on an unknown date for the purpose of making photographs of Union Camp Corporation's property for use in a law suit against the Central of Georgia Railroad Company and Union Camp which is in violation of rule R [2] of the book of operating rules of Southern Railway System." Hendley was suspended from service as of December 1, pending the outcome of the investigation. At Hendley's request, the investigation was postponed until December 8 at 1:00 P.M. On December 8, Hendley filed suit in the district court for the Southern District of Georgia, requesting that the district court enjoin the defendant from conducting the disciplinary hearing and from interfering with his employment. Hendley alleged that the railroad's actions violated 45 U.S.C. § 60, which provides that it is a crime to discipline an employee for voluntarily furnishing information in connection with an FELA case.

The district court denied Hendley's request for an injunction, holding that the disciplinary procedure was a "minor dispute" within the exclusive jurisdiction of the National Railroad Adjustment Board. *Hendley v. Central of Georgia Railroad Co.*, 442 F.Supp. 482 (S.D.Ga. 1977) (citing the Railway Labor Act, 45 U.S.C. § 153 First (i)). Although the court agreed that violations of § 60 can be enjoined in connection with an on-going FELA case, it held that the section does not confer jurisdiction to override the mandatory grievance procedures where the case has been concluded and there is no possibility that evidence

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[2] Rule R of the Southern Railway System's operating rules provides:

> Employees must not divulge to any person other than the shipper, consignee or a duly authorized public officer, any information concerning shipments of freight, which information might be used to the disadvantage of the patrons of the railroad.
>
> Information detrimental to the Company's interests must not be divulged except to proper officers or to others authorized to obtain such information.

will be suppressed through coercion by the railroad. 442 F.Supp. at 486. Hendley filed a notice of appeal and a motion for an injunction pending appeal, stating that he was being irreparably harmed by the defendant's actions, since he was now unemployed. The court denied his motion for an injunction pending appeal.

The disciplinary hearing was conducted on February 15, 1978, and Hendley was dismissed from service on February 25, 1978. Hendley then progressed his grievance through the procedures of the National Railroad Adjustment Board. On April 6, 1979, the Board reviewed the decision and found that Hendley's "disloyalty" warranted disciplinary action,[3] but that dismissal from service was "an extremely harsh penalty." Accordingly, the Board ordered that Hendley be reinstated with full seniority, but without back pay.

It is necessary first for us to define precisely the question that is before us. We are not faced with the broader issue of whether 45 U.S.C. § 60, a criminal statute, may be enforced through a district court's issuance of an injunction in a civil action. The parties agree, and the district court held, that an injunction may issue to prevent violations of § 60 in an ongoing FELA case. The question we must decide is whether a federal court also has jurisdiction, when

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[3] In making this decision, the Board relied heavily on the fact that Hendley had entered the property of Union Camp without authorization. In its award, the Board stated, "This conduct can be characterized as being disloyal in the sense that the Claimant entered properties controlled by the Carrier without authorization and deprived the Carrier of the opportunity to be present at the accident scene when photographs were taken by the plaintiff." We cannot agree that this finding is supported by the evidence. Union Camp Corporation's property is not controlled by the Central of Georgia railroad; the railroad merely has operating rights to the tracks that run through the yard. Furthermore, even if the railroad did control the property, Hendley was not responsible for the attorney's entrance onto the property or his photographing of the area.

an FELA case has been concluded, to enjoin a disciplinary hearing used by a railroad for retaliatory purposes in violation of 45 U.S.C. § 60.

The Railroad Labor Act, 45 U.S.C. §§ 151-163, requires that railroads and railroad employees attempt to settle all minor disputes through grievance procedures. If those procedures fail, either party may appeal to the National Railroad Adjustment Board for compulsory arbitration. *Id.* § 153 First (i). An award of the adjustment board is final and binding on both parties, § 153 First (m), and the scope of judicial review of these awards is narrow. *See Central of Georgia Railway Co. v. United Transportation Union,* 353 F.Supp. 293, 302 (S.D.Ga.1973) (range of judicial review is "among the narrowest known to the law;" awards are final in the absence of fraud or jurisdictional defects). Minor disputes are those disputes which concern the application or interpretation of existing collective bargaining contracts, while "major disputes" concern changes in rates of pay or working conditions where the method of change is not provided in the existing labor contract. *REA Express, Inc. v. Brotherhood of Railway, Airline & Steamship Clerks,* 459 F.2d 226, 230 (5th Cir.), cert. denied, 409 U.S. 892, 93 S.Ct. 115, 34 L.Ed.2d 149 (1972). It is clear that a disciplinary hearing which is conducted in accordance with the procedures set out in an applicable collective bargaining agreement would usually constitute a minor dispute. *See Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.,* 305 F.2d 605, 607 (5th Cir. 1962); *Clark v. Seaboard Coast Line Railroad Co.,* 332 F.Supp. 380, 381 (N.D.Ga.1970). Thus, the National Railroad Adjustment Board has exclusive jurisdiction over this dispute, unless 45 U.S.C.§ 60 is found to override the statutory arbitration processes. We conclude that it does.

The authors of the Federal Employers' Liability Act, recognizing the danger that railroad agents would coerce or intimidate employees to prevent them from testifying, included 45 U.S.C. § 60 in the Act:

> Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges *or otherwise disciplines or attempts to discipline* any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense; *Provided,* That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

[Emphasis added.] This section prohibits a railroad from disciplining or attempting to discipline an employee for furnishing information to an FELA plaintiff. Thus, any disciplinary investigation held solely for the purpose of punishing an employee for such conduct is violative of this statute. Hendley filed suit in federal district court, claiming that the scheduled disciplinary hearing was illegal for this reason. Nevertheless, the district court held that he had an adequate administrative remedy—the disciplinary hearing itself. The court listed a number of questions to be determined in the hearing and the subsequent arbitration, including whether "the disciplinary investigation [was] punitive or coercive in motive or effect." *Hendley v. Central of Georgia Railway Co.*, 442 F.Supp. at 486. The illogical result of such an interpretation is obvious. The employee may be forced to undergo an illegal investigation, and to present in that hearing his claim that the investigation is illegal.

The question of whether a particular disciplinary hearing violates § 60 involves interpretation of a federal statute, and is therefore a matter of federal jurisdiction. An analogous situation was presented in *Brotherhood of Railroad Trainmen v. Smith*, 251 F.2d 282 (6th Cir. 1958); a case arising under the Railway Labor Act. A railroad employee, the plaintiff in that case, was discharged for noncompliance with a Union Shop Agreement. He sought to enjoin enforcement of the discharge order on the ground that the agreement between the union and the railroad, as interpreted and applied, violated § 2 of the Railway Labor Act, 45 U.S.C. § 152. The union argued that the case was within the exclusive jurisdiction of the National Railroad Adjustment Board. Rejecting this argument, the court stated:

> The issue is whether the BRT Union Shop Agreement is valid if interpreted and carried out by the Railroad and BRT so as to deprive Smith and others similarly situated of their employment as conductors. Decision of this issue depends upon the meaning of the statute and over such a question the federal courts have jurisdiction.

251 F.2d at 285. *See also, Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 774-75, 72 S.Ct. 1022, 96 L. Ed. 1283 (1951). Similarly, in the instant case, the issue before the court does not involve interpretation of a collective bargaining agreement, an appropriate matter for resolution by arbitration. Rather, the question is whether a disciplinary hearing brought in accordance with the procedures established in the collective bargaining agreement violates a federal statute. This is a matter properly within the jurisdiction of the federal courts and is not a question to be determined by the administrative board.

This reasoning is also illustrated by a series of cases in which a railroad's conduct was found to be violative of the Railway Labor Act's prohibition against coercion to in-

fluence an employee's choice of a union representative, 45 U.S.C. § 152 Third. In *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.*, 305 F.2d 605 (5th Cir. 1962), a railroad employee who was also a union representative was notified that he would be investigated in accordance with the collective bargaining agreement. He was charged with disloyalty because of his efforts to prevent other employees from settling personal injury suits. He filed suit in federal district court, requesting an injunction on two grounds. First, he claimed that he was not an "employee" subject to Rule 72 of the railroad's operating rules, under which the investigation was brought. The court held that this question involved interpretation of the collective bargaining agreement, and thus was within the exclusive jurisdiction of the railroad adjustment board. Second, the employee claimed that the investigation was the result of a railroad plan to discredit the union and the plaintiff as the union representative. The plaintiff claimed therefore that the disciplinary hearing violated 45 U.S.C. § 152 Third, which prohibits coercion in employees' choice of a representative. The court held that the federal district court had jurisdiction to hear this claim, since the disciplinary hearing, if brought for the purpose of interfering with union representation, was a violation of the Railway Labor Act. The railroad objected that determination of the court's jurisdiction to enjoin the hearing would necessarily require a decision on the merits of the grievance against the plaintiff. The court responded:

> [T]he Railroad may not use the disciplinary proceedings as a guise for thwarting, or frustrating, or undermining the effectiveness of the Brotherhood, or Byington as its agent, in their statutory responsibilities as bargaining representatives. And in passing on the motivation for the disciplinary hearing, the Court may inescapably find itself in the position of necessarily passing on Byington's legal status as an employee, to his benefit or detriment, and the extent to which he therefore owes a duty of fidelity.

305 F.2d at 609. The court held that the plaintiff's claim, if proven, would entitle him to injunctive relief by the federal district court. *Id.*

Section 60, like § 152 Third, is a specific prohibition of certain conduct by a railroad.[4] A plaintiff may not be denied access to the federal courts when his employer uses its grievance procedures and disciplinary powers in direct violation of this statute. If an employee can show that the object of a railroad's investigation is to discipline the employee for furnishing information in an FELA case, then injunctive relief by a federal district court is "appropriate if not compelled." *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.*, 305 F.2d at 609; *see Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914, 918 (7th Cir. 1974).

Finally, a district court's ability to enjoin a hearing or conduct which violates § 60 is essential to effectuate the purpose of the section. In *Kozar v. Chesapeake & Ohio Railway Co.*, 320 F.Supp. 335 (W.D.Mich.1970), *affirmed in part and vacated in part*, 449 F.2d 1238 (6th Cir. 1971), a district court recognized the intimidating effect of any exercise of a railroad's power against an FELA witness:

> [R]ailroad employees are subject to considerable pressure if called to give testimony against their em-

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[4] In a later case, *Brotherhood of Railroad Trainmen v. Southern Railway Co.*, 393 F.2d 303 (5th Cir. 1968), the plaintiff railroad relied on *Brotherhood of Railroad Trainmen v. Central of Georgia* and requested that the district court enjoin union activity alleged to have violated the general policy provisions of the Railway Labor Act. The court rejected this argument, stating that § 152 Third, the basis for injunction in the earlier case, was more than a general policy statement, since it "specifically prohibits interference by the carrier with the designation of representatives by the union." *Id.* at 307. This decision illustrates the similarities between § 152 Third and § 60, and the necessity of federal court jurisdiction to enjoin their violation. Both statutes involve much more than mere policy statements—they declare certain conduct unlawful and provide criminal penalties for violation.

> ployer. This pressure need not be the result of direct threats or arm-twisting; it is not necessarily the object of deliberate railroad policy. But whether by design or accident, the fact remains that these working men, through numerous contacts with supervisors and claim agents during the discovery process, often believe that a wrong step—defined by railroad rules (real or apparent) and interpreted by railroad officials—may result in sanctions, and that the wrong testimony—potentially costing the railroad large amounts of money—might arouse the displeasure of those in control of their livelihood. The tremendous power of a corporation like the Chesapeake and Ohio Railroad, coupled with its aggressive efforts to defeat the claims of those injured by its activities—even when the victims are their most valuable employees—can overawe and even cower those individuals upon whom an opposing party must rely to substantiate his claim.

320 F.Supp. at 369-70. If a railroad is allowed to discipline an employee for furnishing information to an FELA plaintiff, and the employee is required to submit to the hearing and to process his claim through arbitration before finally reaching the federal courts, the coercive effect is overwhelming. Employees who consider testifying in an FELA case will understandably hesitate if they know that they may be forced, as Hendley was, to undergo a formal investigation and possibly suspension for a lengthy period of time. The fact that the employee may ultimately prevail is of little assurance to one who faces possible unemployment for a year or more. Thus, the disciplinary procedure not only violates the mandate that an employer refrain from disciplining an employee for furnishing information, it also becomes a device the "effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest." 45 U.S.C. § 60.

For these reasons, we hold that a district court has jurisdiction, even after the conclusion of an FELA case, to enjoin any proceeding which is violative of § 60. We do not hold that an employee may never be disciplined for his conduct in connection with an FELA case. If, for example, an employee removed documents or confidential files from the railroad's offices, disciplinary action would be appropriate for violation of the company's rules. We simply hold that a federal district court has jurisdiction to determine whether a disciplinary hearing is brought for purposes violative of § 60, or whether the railroad is attempting to discipline the employee for a violation of lawful company rules.[5]

It is clear from a review of the testimony before the investigating board that the actions of Hendley which were the subject of the investigation are within the protection of § 60. The railroad apparently charged that Hendley had made arrangements for Moore to go onto the property of Union Camp, had driven him in on a locomotive, and had assisted him in photographing the accident scene. The testimony at the hearing showed that Hendley did not make arrangements for Moore to enter the property; he did not even know that Razook would be accompanied by his attorney until he was met by Razook and Moore on Union Camp property. The men did not drive or ride a locomotive into the area. Hendley did not photograph the

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[5] The railroad argued that the plaintiff's appeal is moot, since the dispute has been processed to conclusion through the procedure of the National Railroad Adjustment Board. We find this contention to be without merit. The plaintiff initially requested that the court enjoin the railroad from conducting the proposed investigation and from interfering with the plaintiff's employment. Although the disciplinary proceeding itself has been concluded, the unlawful effects of the proceeding have not. The continued denial of back pay for the year that Hendley was unemployed is a present unlawful interference with Hendley's right of employment, and constitutes a continuing violation of § 60.

area or assist Moore in making photographs. Hendley's only "disloyalty" consisted of meeting Razook and his attorney on the property, discussing the physical layout of the tracks, and giving a deposition to be used in the case—conduct that falls within the protection of § 60.

Since Hendley's actions could not lawfully be the subject of disciplinary action and arbitration, any award made by the National Railroad Adjustment Board is null and void. We reverse, and remand to the district court to order that the award of the National Railroad Adjustment Board be set aside, and that Hendley receive full back pay for the time that he was suspended or unemployed as a result of the railroad's actions.

REVERSED and REMANDED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1058
D. C. Docket No. CA CV4-77-269

JAMES E. HENDLEY,
Plaintiff-Appellant,
versus

CENTRAL OF GEORGIA RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

Before TUTTLE, VANCE and KRAVITCH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

January 15, 1980

A true copy Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/ SARAH L. HOLMES
Deputy
New Orleans, Louisiana March 20, 1980

ISSUED AS MANDATE: MARCH 20, 1980

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CV477-269

JAMES E. HENDLEY,

Plaintiff

VS.

CENTRAL OF GEORGIA RAILROAD COMPANY,

Defendant

December 28, 1977

ORDER

I

James E. Hendley is an employee of Central of Georgia Railroad Company which is a part of the Southern Railway System. He seeks an injunction against the defendant's pending disciplinary investigation growing out of his activities in connection with a co-employee's personal injury suit against Central under the Federal Employers' Liability Act.

Mr. Hendley is a switch engine foreman. It appears that in off-duty hours, he assisted Daniel Razook in the latter's personal injury action against Central and Union-Camp Corporation. He was present in a switch engine which carried one of plaintiff's attorneys (a former officer in the Switchmen's Union) onto Union-Camp's woodyard where photographs were made for use in the FELA action filed by Razook.[1]

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[1] See Hendley's pre-trial deposition in the Razook case. He did not testify at the trial of the claim against Central of Georgia and Union-Camp Corporation. The pictures taken at the woodyard were used in the trial.

Following the trial and settlement of the damage suit, written notice was sent to Hendley scheduling a disciplinary investigation based on "disloyalty" and the violation of rule R of Southern Railway System's operating rules.[2] Hendley who has been suspended responded with a suit seeking injunctive relief in this Court. Jurisdiction is predicated upon 28 U.S.C. § 1331(a) [federal question]; 45 U.S.C. § 60 [prohibiting a carrier's prevention of an employee's volunteering information as to a claim to one in interest], and 45 U.S.C. § 56 [jurisdiction over personal injury cases under the Federal Employers' Liability Act].

Hendley maintains that the investigation is intimidatory in nature and is a palpable violation of 45 U.S.C. § 60. The disciplinary proceeding constitutes, plaintiff complains, a mere reprisal because Central was the loser in Razook's action for damages. Plaintiff argues that relief can and should be granted by this Court in the way of enjoining the imminent disciplinary investigation.

The Railroad contends that this Court is without jurisdiction to do so and that Mr. Hendley has no remedy in the courts until he has exhausted the procedures provided for in the collective bargaining contract and the Railway Labor Act, 45 U.S.C. §§ 151-159. Central takes the position that the statute in question establishes "primary exclusive jurisdiction" in the National Railroad Adjustment Board and the procedures created in that Act.

The scheduled investigation was postponed pending a decision by this Court as to the jurisdictional question. Briefs have been filed and oral argument heard.

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[2] "Information detrimental to the Company's interests must not be divulged except to proper officers or to others authorized to obtain such information." The letter scheduling the hearing on the charge of disloyalty is dated December 1, 1977, immediately following the trial of the case in the Superior Court of Chatham County.

II

Under 45 U.S.C. § 60, which is an adjunct of the Federal Employers' Liability Act, any contract, rule or device is void that is intended or has the effect of preventing employees of a common carrier from voluntarily furnishing information to a person in interest as to the facts incident to the injury or death of an employee. Anyone who by threat, intimidation, contract, rule or device attempts to prevent the voluntary furnishing of information or who disciplines or attempts to discipline an employee for doing so is guilty of a criminal offense. 45 U.S.C. § 60. It was the intent of Congress to see to it that an injured employee could readily obtain all the available information from witnesses, particularly employees of the railroad company. *Dugger v. Baltimore & O. R. Co.*, 5 F.R.D. 334 (E.D., N.Y.). The purpose of the statute is to prevent the coercion of employees upon whom an employee claimant depends to substantiate his claim against the railroad. *Kozar v. Chesapeake and Ohio Railway Company*, 320 F. Supp. 335, 369-70, 383-85 (W.D., Mich.), reversed in part upon other grounds, 449 F.2d 1238 (6th Cir.). In *Kozar* the District Judge observed that where there are coercive practices by a carrier, "Every remedial weapon, including contempt, will be available to insure uninhibited exercise of federal rights." p. 386.

The Collective Bargaining Agreement between the Central of Georgia Railroad Company and the Switchmen's Union of which Mr. Hendley was a member provides for an investigation of grievances. Where the Railroad brings charges, the employee has full opportunity to hear the testimony of all witnesses and to present his side of the case. If the result of the investigation is disciplinary action or dismissal of the employee, there is a right of appeal to the next higher officer and from him to the next higher one. Article 18 of the Collective Bargaining Agreement.

Because of the huge backlog of minor disputes before the Adjustment Board, Congress amended the Act in 1966 to provide for the establishment of special adjustment boards to resolve disputes otherwise referable to the Board itself. The machinery created establishes a mandatory arbitration alternative. See *Brotherhood of Locomotive Engineers v. Denver & Rio Grande Western Railroad Company*, 411 F.2d 1115, 1118 (10th Cir.). The awards of the special adjustment boards are "final and binding upon both parties to the dispute." 45 U.S.C. § 153 First (m). The range of judicial review of an award by such a board is a narrow one. See *Central of Georgia Railway Company v. United Transportation Union*[*s*], 353 F. Supp. 293, 302 (S.D., Ga.).

The Railway Labor Act (45 U.S.C. §§ 151-163) contemplates and commands that the parties attempt to settle all minor disputes through grievance procedures, failing which either party has the right of recourse to compulsory arbitration by way of appeal to the National Railroad Adjustment Board. 45 U.S.C. § 153 First (i). A "minor" dispute generally concerns the meaning or proper interpretation and application of rules or working conditions under the collective bargaining agreement. Major disputes "look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." *Itasca Lodge 2029 of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Railway Express Agency Incorporated*, 391 F.2d 657, 662-664 (8th Cir.), quoting *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711, 723.

III

The logical extreme to which plaintiff's argument leads us is that a Railroad may not discipline an employee who aids a fellow employee in developing his case against the carrier. According to plaintiff, there can be no "disloyalty"

grievance since 45 U.S.C. § 60 makes a federal crime out of disciplinary reprisals by the carrier.

I cannot agree that that statute abolishes employer charges and grievances as to employee disloyalty. Internal disciplinary hearings at company level under a collective bargaining agreement constitute neither harassment nor other violation of 45 U.S.C. § 60. *Clark v. Seaboard Coast Line Railroad Company,* 332 F. Supp. 380, 381 (N.D., Ga.). See also *Seaboard Air Line Railroad Company v. Wilkinson,* 216 Ga. 338, 342.

Much in point is *Brotherhood of Railway and Steamship Clerks v. Atlantic Coast Line Railroad Company,* 154 F. Supp. 71 (E.D., N.C.), aff'd. 253 F.2d 753 (4th Cir.). The underlying facts in that case bear striking resemblance to those in the present case. A Union official who was an employee of ACL had assisted the attorney for another employee in the preparation of his FELA suit by surreptiously arranging for the access of a photographer to the Railroad's office building in order to take pictures of a spiral stairway on which plaintiff had been injured. The plaintiff was discharged following disciplinary proceedings pursuant to the bargaining agreement. The Railroad Adjustment Board found such termination of employment to be without cause. In the ensuing enforcement proceeding in connection with such award the district court reversed on the ground of the employee's disloyalty. On appeal to the Fourth Circuit that ruling was affirmed.

In the case of *Greenwood v. Atcheson, Topeka and Santa Fe Railway Company,* 129 F. Supp. 105 (S.D., Cal.) the employee sued for damages for wrongful discharge. He had previously processed his grievance through the National Railroad Adjustment Board which denied his claim and refused reinstatement. The District Court held that the award in question was final and that no remedy existed

beyond the administrative claim.[3] It found that 45 U.S.C. § 60 conferred no right of action on a plaintiff pursuant to the Federal Employers' Liability Act.

IV

Title 45 U.S.C. § 60 is a criminal, not a jurisdictional statute. I have little doubt that violations of that Section may be enjoined in connection with an on-going FELA case. See *Clark v. Seaboard Coast Line Railroad Company*, 332 F. Supp. 380, *supra; Kozar v. Chesapeake and Ohio Railway Company, supra*, 320 F. Supp. 335. Here, however, the Razook case has been tried and settled. There was no suppression of evidence through coercion by the Railroad. The purpose of the present suit for injunction is not to obtain relief under 45 U.S.C. § 60. It is to by-pass the mandatory remedies prescribed by Congress under the guise of the criminal statute. Clearly, plaintiff has an adequate administrative remedy under the law. It is no answer to say that proceedings under the National Railway Labor Act take too long.

The dispute involved in this case is part of the ordinary, diurnal grist of employee-employer relations. The questions involved in the disciplinary investigation include whether or not the conduct complained of constituted disloyalty. Was Switch Foreman Hendley merely voluntarily furnishing information for use in the suit against Central? Did Mr. Hendley have the right to furnish or provide same to a co-employee? Is the disciplinary investigation punitive or coercive in motive or effect?

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[3] The Supreme Court agreed in *Union Pacific Railroad Company v. Price, supra*, 360 U.S. 617 that the submission by the plaintiff of his grievance to the Adjustment Board in respect to his discharge from employment precludes him from seeking damages in a subsequent common-law action. Congress never intented that the Railroad Adjustment Board should only render advisory opinions.

Such questions of fact (or law) are determinable under established grievance and arbitral procedures, contractual and statutory.

Awards of the special adjustment boards are, as stated, "final and binding upon both parties to the dispute." 45 U.S.C. § 153 First (m). The jurisdiction of the National Railroad Adjustment Board and its remedial processes is exclusive, primary and mandatory in the case of minor disputes under collective bargaining agreements. The statutory procedures represent a comprehensive system for resolving such controversies and a party may not turn to the courts for relief before the administrative body has first evaluated and decided the dispute. See *Slocum v. Delaware Lackawanna & Western Railroad Co.*, 339 U.S. 239; *Union Pacific Railroad Co. v. Price*, 360 U.S. 601, 616; *International Brotherhood of Electrical Workers v. Washington Terminal Company*, 473 F.2d 1156, 1172-73 (D.C. Cir.), cert. den. 411 U.S. 906. The role of the courts in adjustment of labor disputes does not begin until there has been exhaustion of the contractual and statutory arbitration processes. *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 325-26.

The courts that have considered the effect of 45 U.S.C. § 60 on jurisdiction in suspensions or terminations growing out of charges of employee perfidy have concluded that that provision of FELA does not preclude, in a proper case, such punishment. Nor does it confer jurisdiction upon the district courts to decide that issue. I have read the authorities relied on by plaintiff's counsel and do not find them to be persuasive.[4]

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[4] A few words probably should be said concerning *Texas & New Orleans Railroad Company v. Brotherhood of Railway & Steamship Clerks et al.*, 281 U.S. 548. The Railway Labor Act of 1926 contained a provision that representatives of the disputant parties should be selected by the respective parties without influence or

Finding neither a clear and specific grant of federal jurisdiction nor any statutory overriding of the remedies established in labor disputes, the injunctive relief sought must be and is denied and the complaint dismissed. The defendant Railroad is free to reschedule the disciplinary investigation and to proceed therewith.

This December 28th, 1977.

/s/ ALEXANDER A. LAWRENCE
Judge, United States District Court
Southern District of Georgia

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coercion by the other. The defendant Railroad had recognized a company Union as the representatives of its clerical parties and an injunction against it was granted below. Defendants contended in the Supreme Court that the statutory provision referred to created a mere abstract right without provision for enforcement by legal proceedings. The Court affirmed. It said: "The definite prohibition which Congress inserted in the Act cannot . . . be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." At 569.

But this is not to say that a right to be free from coercion as set forth in a criminal law operates to displace a statutory system of mandatory arbitration embracing the very controversy between the parties in respect to loyalty.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action File No. CV477-269

JAMES E. HENDLEY

vs.

CENTRAL OF GEORGIA RAILROAD COMPANY

JUDGMENT

This action came on for consideration before the Court, Honorable Alexander A. Lawrence, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that in accordance with such decision Judgment is rendered in favor of the Defendant, CENTRAL OF GEORGIA RAILROAD COMPANY, and against the Plaintiff, JAMES E. HENDLEY. Costs are assessed against Plaintiff.

Dated at Savannah, Georgia, this 28th day of December, 1977.

LOUIS E. AENCHBACHER
Clerk of Court

By /s/ MICHAEL L. ARIUTF
Deputy Clerk

APPENDIX F

PUBLIC LAW BOARD NO. 2086

Case No. 7

Award No. 1

Parties to Dispute:

CENTRAL OF GEORGIA RAILROAD COMPANY

vs.

UNITED TRANSPORTATION UNION

April 6, 1979

Statement of Claim:

(a) Claim on behalf of Savannah Yardman James E. Hendley for reinstatement to service with seniority unimpaired, compensation for all lost time earnings and all benefits deprived of, including but not limited to, holiday pay and health and welfare benefits account suspended from service on December 1, 1977.

(b) Claim on behalf of Savannah Yardman James E. Hendley for reinstatement to service with seniority unimpaired, compensation for all lost time earnings and all benefits deprived of, including but not limited to, holiday pay and health and welfare benefits on account of being suspended from service on December 1, 1977, and later being dismissed from service on February 25, 1978.

Findings: The Board, upon the whole record and all the evidence, finds that:

The Carrier and the employee involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as amended.

The Board has jurisdiction over the dispute involved herein.

The Parties to said dispute were given due notice of hearing thereon.

The Claimant in this case was a Yard Foreman with over twenty-five years of service and was Local Chairman for the past six years. One of the Claimant's fellow employees filed a personal injury lawsuit against the Carrier and Union Camp Corporation in December of 1976. In the preparation of his lawsuit the plaintiff was confused about the exact physical description of the location where he was injured. The Claimant assisted the plaintiff in his efforts to clarify this confusion about the location of the injury. The Claimant, while off duty, met the plaintiff and his personal attorney at the entrance to the Union Camp Yard and they proceeded onto the property which was either owned or controlled by the Carrier. They arrived at the scene of the personal injury and the plaintiff's attorney photographed the area. The Claimant, the plaintiff and his attorney then left the premises together.

On November 11, 1977 the Claimant appeared and gave his deposition in the plaintiff's lawsuit. The Carrier's attorney and Claim Agent were present at this deposition in which the Claimant related his visit to the accident scene. The Carrier's Claim Agent did not have any authority over the Claimant. After November 11, 1977, the Carrier's Superintendent, who had authority over the Claimant's conduct, was involved in the preparation of the defense in the civil action and reviewed the Claimant's deposition. Following this review the Superintendent charged the Claimant with disloyalty and suspended him on December 1, 1977, pending an investigation. The Claimant submitted a claim protesting this suspension on February 14, 1978. On February 15, 1978 an investigation was held. On February 25, 1978, the Claimant was notified of his dismissal

from service. The Claimant then submitted a claim protesting his dismissal.

Article 21 (b) of the schedule agreement provides:

> If an appeal is taken from decision rendered, it shall be presented to the next highest officer without delay and not later than 60 days from date of decision.

The Claimant was suspended from service on December 1, 1977 and did not file his first claim until February 14, 1978, which was more than sixty (60) days following the Carrier's suspension decision. The Claimant's initial claim, therefore, must be denied without any consideration of the merits. The Claimant's second claim protesting his dismissal, however, was timely filed.

This Board has reviewed the entire record in this case and finds that the Claimant was afforded a fair, impartial and timely hearing. The record shows the Claimant assisted another employee who was pursuing a civil action for personal injuries against the Carrier. The Claimant's conduct was designed to show the plaintiff the actual conditions at the scene of the accident. There was no intent to distort the facts or evidence in the civil action. There was no intent to encourage the litigation against the Carrier. The Claimant merely intended to assist the plaintiff so he could accurately describe the physical conditions at the accident scene. The plaintiff could have used available discovery procedures to acquire the same evidence. If such procedures had been used, the defendants in the civil action could have been present. Essentially, the Claimant has deprived the Carrier of the opportunity to be present at an examination of the accident scene by the plaintiff.

This conduct can be characterized as being disloyal in the sense that the Claimant entered properties controlled

by the Carrier without authorization and deprived the Carrier of the opportunity to be present at the accident scene when photographs were taken by the plaintiff. Even though the Claimant's conduct was contrary to the Carrier's procedural interests, his primary motivation was to assist a fellow employee in ascertaining the truth. There was no intent to undermine the Carrier's position in the civil action. Photographs taken at the accident scene were used in the trial of the civil action, but the Claimant did not testify. There was no evidence that these photographs were inaccurate or misleading. There was no evidence that the plaintiff in the civil action was not entitled to acquire such photographs for the preparation and trial of his lawsuit. There was evidence that the plaintiff was not entitled to acquire these photographs through the Claimant.

The Claimant has argued that as a union representative and fellow employee, he had the right to assist the plaintiff during off duty hours. Such conduct would not be considered disloyalty. The Claimant, however, provided more than off duty assistance when he made an unauthorized entry upon the properties controlled by the Carrier. The Claimant has misinterpreted his right and duty to assist his fellow employee and union member. He has been disloyal to the Carrier.

This offense warrants disciplinary action. The penalty invoked by the Carrier must be appropriate for the proven offense. It cannot be arbitrary, capricious or discriminatory. Given the nature of the Claimant's conduct, his long service and the absence of any wilful misconduct, dismissal from service is an extremely harsh penalty. This Board, therefore, has concluded that the Claimant should be reinstated with full seniority, but without any back pay.

AWARD

1. The first claim is hereby denied.

2. The second claim is hereby sustained, in part, in accordance with the findings. The Claimant shall be reinstated with full seniority, but without any back pay. Award to be complied with within thirty (30) days from date of this award.

PUBLIC LAW BOARD NO. 2086

/s/ ROBERT G. WILLIAMS
Neutral

/s/ R. E. LOOMIS
Carrier Member

/s/ J. M. HICKS, Dissenting
Organization Member

Date: April 6, 1979

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1058

JAMES E. HENDLEY,
Plaintiff-Appellant,

versus

CENTRAL OF GEORGIA RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion January 15, 1980, 5 Cir., 197—, —— F.2d ——).

(March 12, 1980)

Before TUTTLE, VANCE and KRAVITCH, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local

Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ ELBERT P. TUTTLE
United States Circuit Judge